# Back to the Future?

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2019 has been a year of almost constant constitutional episodes in the UK, culminating in an unlawful prorogation of Parliament, a defeat of the programme motion for the European Union (Withdrawal) Agreement Bill and swiftly enacted legislation to enable a general election on 12 December. The results of that election may herald a change in direction, producing a a Conservative Government with a large majority in the House of Commons.

Brexit, of course, remains front and centre on the political agenda. This is especially so due to the fact that the new European Union (Withdrawal) Agreement Bill (WAB) may make it unlawful for the UK to extend the transition period. Effectively, this puts Britain leaving in a "no deal" situation back on the table, this time with exit taking place at the end of the transition period rather than on exit day. Whilst, as the Early Parliamentary General Election Act 2019 amply demonstrates, even important constitutional legislation can be quickly modified or repealed, the current political climate would suggest that there is no appetite in the Government to delay Brexit, even if this means leaving the EU with no future trade deal.

What has received less attention, until recently, is the proposed constitutional changes in the 2019 Conservative Party Manifesto. These suggestions for constitutional change could have serious long-term impacts upon the British constitutional settlement. Page 48 contains a series of clear, and less clear, proposed constitutional changes. Clear statements indicate that the Conservative Government plans to 'get rid of the Fixed Term Parliaments Act', to update constituency boundaries, and to 'continue to support the First Past the Post system' for the Westminster Parliament.

The manifesto also makes more opaque promises to 'look at the broader aspects of our constitution'. Suggestions in this category include examining 'the relationship between the Government, Parliament and the courts; the functioning of the Royal Prerogative; the role of the House of Lords; and access to justice for ordinary people.' There is also a promise to 'update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government.' The substance of this promise includes an assurance that 'judicial review is available to protect the rights of the individuals against an overbearing state'. However, the re-evaluation is aimed at 'ensuring that it is not abused to conduct politics by another means or to create needless delays.' No further clarity is given as to the nature of these changes, but there is a promise to establish a 'Constitution, Democracy and Rights Commission' who will be tasked with the job of proposing constitutional reform.

# A clear direction of travel

The manifesto text surrounding these proposed changes resembles both previous Conservative Party Manifestos and actual changes made to judicial review by earlier Conservative governments. These proposals can also be read in light of a speech given by Martin Howe QC to the Bruges group at the Conservative Party Conference on 30 September 2019, where he called for a Restoration of the Constitution Bill.

Although the UK has appeared to move from one constitutional crisis to the next, there has been a clear direction of travel. 2019 saw both the legislature and the courts strengthening their checks over the executive. In Parliament, this was illustrated by three Governmental defeats, with the House of Commons voting against Theresa May's Withdrawal Agreement. It also witnessed two Private Members Bills – the Cooper/Letwin Bill and the Benn/Burt Bill – which became the European Union (Withdrawal) Act 2019 and the European Union (Withdrawal) (No 2) Act 2019. Successful Private Members Bills are a rare creature in the UK, particularly those that are not backed by the Government, let alone those whose purpose is to require the Government to act, here leading to two extensions to the Article 50 negotiation period.

These succeeded through the novel deployment of Standing Orders – the internal rules of the House of Commons which regulate debates and proceedings. The first occurred through a vote to suspend Standing Order 14, enabling the timetabling for the Bill in the House of Commons. The second was enacted through the use of Standing Order 24 – previously interpreted as only allowing for neutral motions – used to propose the Bill and to establish its timetable through the House of Commons. The legislature asserted its check over the executive, holding it to account for its policies and blocking those which did not have the approval of the House of Commons.

The clearest example of the legal check over the executive was the Supreme Court decision in *R (Miller) v Prime Minister/Cherry v Advocate General for Scotland*. The unanimous decision of 11 Justices of the Supreme Court concluded that the prorogation of the Westminster Parliament for five weeks of the remaining eight weeks before then expected exit day of 31 October was unlawful. The court placed clear constitutional limits on the powers of the executive to uphold parliamentary sovereignty and parliamentary accountability. The Government is accountable to Parliament which, in turn, is accountable to the people.

# Reversing the direction of travel

The Conservative Party Manifesto may be interpreted as an attempt to reverse this direction of travel. The proposals on constitutional change are prefaced with a reminder that 'many MPs have devoted themselves to thwarting the decision of the British people in the 2016 referendum'. The removal of the Fixed Term Parliaments Act 2011 may grant almost complete discretion to the Prime Minister as to when to dissolve Parliament and hold a new general election. Martin Howe QC, suggests that

this may be best done through the enactment of a Restoration of the Constitution Bill, perhaps to ensure that a complete discretion to the Prime Minister set out in legislation is less capable of being limited by the courts than a prerogative power whose content is determined by the common law.

The talk of ensuring that courts are not used to perform politics by another means, or to cause unnecessary delays looks similar to the statements of the then Lord Chancellor, Christopher Grayling MP, when introducing what became the Criminal Courts and Justice Act 2015. The 2015 Act was designed to alleviate his concerns 'about time and money being wasted in dealing with unmeritorious cases which are often brought simply to generate publicity or to delay implementation of a decision that has been made properly'. This legislation was intended to curb judicial review, making it more difficult to obtain standing to bring an action for judicial review, as well as to receive a remedy. It also dissuaded public interest groups from bringing judicial review actions or intervening in such actions by placing them under a greater risk of facing higher costs, or having to pay for the costs of the winning party. This would appear to suggest that any redress of the balance will be in favour of curbing the power of the courts. In his speech to the Bruges Group, Martin Howe QC referred to the need to replace the Supreme Court with a 'newer low key and less activist court of final appeal'.

Some may see this as a return to a traditional understanding of the UK Constitution after a blip caused by Brexit. The UK is used to strong Goverments, and the job of the Opposition is to provide a possible future alternative government rather than holding the executive to account. This is not to say that there are no limits on the power of a strong majority – research demonstrates that backbench MPs may play a key role in shaping and limiting governmental policies. But, as is often cited, Lord Hailsham regarded the government's general domination of the House of Commons as an 'elective dictatorship'.

Regardless of whether one prefers strong government, or more deliberative forms of democracy, it is easier to justify a strong government majority when that government has the backing of the majority of the electorate. But First Past the Post only guarantees this when there are just two political parties. This is not the case in the UK. It is not an accurate representation of Westminster, particularly given the number of seats currently held by the SNP. Nor is true that widespread public deliberation takes place within political parties given the small proportion of citizens of the UK who are members of a political party.

Read in this context, the Conservative Manifesto seeks to halt the current direct of constitutional travel and reinstate the executive at the centre of the Constitution. The manifestos of other political parties also proposed constitutional change. But the method of change was different. The Labour Party manifesto, for example, proposed the use of citizens' assemblies. The Liberal Democrats advocated a similar use of assemblies on key issues, such as climate change. If we are serious about constitutional reform, particularly in the face of a concern as to extent to which MPs can thwart the will of the people, such reform would be far more constitutionally legitimate were it to involve the same citizens whose wishes the Government wishes to promote with its promise to get Brexit done.

*With thanks to Hayley J Hooper for comments on an earlier version.*

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